

No. 82 - 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY OF PETITIONERS

JOHN K. VAN DE KAMP

Attorney General

SANFORD N. GRUSKIN

Assistant Attorney General

MICHAEL I. SPIEGEL*

CHARLES M. KAGAY

WAYNE M. LIAO

Deputy Attorneys General

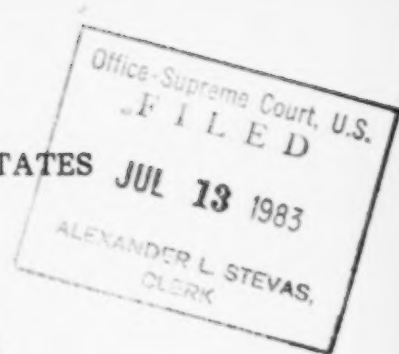
6000 State Building

San Francisco, CA 94102

Telephone: (415) 557-3415

Attorneys for Petitioners
State of California

(*Counsel of Record)



ROBERT K. CORBIN, ESQ.

Attorney General

ALISON B. SWAN, ESQ.

Chief Counsel

RICHARD A. ALCORN, ESQ.,

Assistant Attorney General

Antitrust Division

1275 West Washington, Room 140

Phoenix, Arizona 85007

Telephone: (602) 255-4751

FREDERICK P. FURTH, ESQ.

RICHARD S.E. JOHNS, ESQ.

Furth, Fahrner, Bluemel

& Mason

201 Sansome Street

San Francisco, CA 94104

Telephone: (415) 433-2070

Attorneys for the

State of Arizona

DAVID FROHNMAYER, ESQ.

Attorney General

RICHARD L. CASWELL

Chief Counsel

Antitrust Division

100 State Office Building

Salem, Oregon 97310

Telephone: (503) 378-4732

Attorneys for the

State of Oregon

KEN EIKENBERRY, ESQ.

Attorney General

JOHN R. ELLIS, ESQ.

JON P. FERGUSON, ESQ.

STUART C. ALLEN, ESQ.

Assistant Attorneys General

Antitrust Division

13th Floor

Dexter Horton Building

Seattle, Washington 98104

Telephone: (206) 464-6280

Attorneys for the

State of Washington

JIM SMITH, Attorney General

JEROME W. HOFFMAN, ESQ.

Assistant Attorneys General

Antitrust Unit

Department of Legal Affairs

The Capitol

Tallahassee, Florida 32301

Telephone: (904) 488-9105

STEPHEN L. DUNNE, ESQ.

Special Assistant Attorney

General

1139 Camino Del Mar

Del Mar, CA 92014

Telephone: (619) 481-5291

Attorneys for the

State of Florida

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Associated General Contractors</u> <u>of California v. California</u> <u>State Council of Carpenters</u> <u>(1983) ___ U.S. __,</u> <u>103 S.Ct. 897</u>	4
<u>Bogosian v. Gulf Oil Corp.</u> <u>(3d Cir. 1977) 561 F.2d 434,</u> <u>cert den. (1978) 434 U.S. 1083</u>	2, 3, 4, 6
<u>Illinois Brick Co. v. Illinois</u> <u>(1977) 431 U.S. 720</u>	2, 3, 4, 6, 7

No. 82 - 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

STANDARD OIL COMPANY OF CALIFORNIA, et
al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY OF PETITIONERS

Plaintiffs file this brief reply to correct several serious mischaracterizations that underpin defendants' Brief in Opposition (BIO). At one point, defendants recast plaintiffs' allegation of a horizontal retail price-fixing conspiracy into an allegation of horizontal wholesale price-fixing. (BIO at pp. 8-11) They do so with the obvious intention of making this action appear to

be what it is not: another Illinois Brick Co. v. Illinois (1977) 431 U.S. 720. At another juncture, defendants recast plaintiffs' allegations of horizontal price-fixing into a curious form of vertical restraint, a "coercive exclusive-dealing arrangement." (BIO at pp. 9-10.) They do this because they want the present action to resemble Bogosian v. Gulf Oil Corp. (3d Cir. 1977) 561 F.2d 434, cert den. (1978) 434 U.S. 1083, which concerns nothing more than tying, id. at 439, and because class certification is more problematical when a vertical conspiracy is alleged. BIO at pp. 19-20, fn. 20.

In the face of such irresponsible misrepresentations, plaintiffs will once again briefly state their allegations, as they have been borne out by discovery. Defendants horizontally agreed to raise retail prices. Unlike the Illinois Brick defendants, defendants here did not fix wholesale prices to dealers because, unlike the Illinois Brick defendants, they did not compete at wholesale. Under the terms of their contracts with their branded dealers, defendants could and did change the price of gasoline to dealers at will — even after the gasoline was delivered. There

was no wholesale market to give dealers the option of buying their gasoline elsewhere — they could either accept defendants' prices or break their leases and leave their stations. Each defendant sold branded gasoline only through its own dealers, and each branded dealer obtained gasoline only from its own franchisor. A wholesale market restrained by wholesale price-fixing, the crucial element of Illinois Brick, simply does not exist in the present action.

The purpose of price-fixing is the avoidance of price competition. In the consumer petroleum industry, price competition for branded gasoline occurred solely at the retail level. Therefore, the wholesale level price-fix, which plaintiffs do not allege but to which defendants repeatedly allude, is a complete non sequitur.

Thus, defendants' repeated assertion that the Bogosian litigation is the direct purchaser analogue of MDL-150 is completely hollow. The Bogosian plaintiffs allege that defendants tie their gasoline to their station leases, and that all defendants do so because of some form of interdependent conscious parallelism. Bogosian v. Gulf Oil Corp., supra,

(3d Cir. 1977) 561 F.2d at 439. Regardless of whether the Bogosian plaintiffs prevail, that action obviously does nothing to challenge defendants for what plaintiffs here allege: a horizontal agreement on the retail prices to be paid by consumers. Neither before nor after Illinois Brick has there been any suggestion in the law that an antitrust action by one set of plaintiffs under one theory invalidates an action against the same defendants by different plaintiffs under a different theory.

More generally, the question here is not whether a dealer could sue defendants—anyone with the filing fee can bring an action in federal court. The question is who between captive dealers and retail consumers can sue for the horizontal fixing of retail prices. Logic suggests, and Associated General Contractors of California v. California State Council of Carpenters (1983) __ U.S. __, 103 S.Ct. 897, makes explicit, that dealers cannot recover for the overcharges of a retail price-fix because they are not consumers in the affected market. Id., at 909.

Nobody else has sued defendants for the conspiracy plaintiffs have uncovered, and nobody else can. Defendants face absolutely no threat of double exaction if plaintiffs are allowed to recover. A denial of plaintiffs' claim, however, grants defendants complete immunity from liability for the most blatant horizontal price-fixing.

The question can be presented in stark factual terms. Representatives of defendant oil companies periodically communicated to one another their intention to "restore" retail prices from competitive levels to "normal" levels. Rather than awaiting the interplay of market forces when they changed prices, defendants confirmed retail price increases with one another to be certain that competition would not defeat a price increase. Shortly thereafter, the retail prices at defendants' branded stations over broad geographic regions simultaneously jumped to their maximum ("normal") level. Plaintiffs urge that the consumers who paid these retail prices should recover. The courts below ruled that retail consumers cannot recover. Since there is not even a theoretical basis for dealer recovery (in

particular, the Bogosian plaintiffs do not begin to allege these facts), plaintiffs have brought this petition to question whether such behavior should be deemed outside the ambit of antitrust enforcement.

Defendants strongly urge, as they successfully did below, that the easiest course is to assume that Illinois Brick can be mechanically applied to any fact situation without an appraisal of the decision's underlying purposes. While this suggestion may chart the simplest course, it substitutes empty formalism for justice. Defendants have illegally exacted millions if not billions of dollars from millions of consumers and now baldly ask this Court to turn its back on the conspiracy's direct victims. Plaintiffs submit that

this Court's intervention is required to make certain that Illinois Brick will strengthen, not destroy, antitrust enforcement.

DATED: July 12, 1983

JOHN K. VAN DE KAMP
Attorney General
SANFORD N. GRUSKIN
Assistant Attorney
General
MICHAEL I. SPIEGEL
CHARLES M. KAGAY
WAYNE M. LIAO
Deputy Attorneys
General
6000 State Building
San Francisco, CA 94102
(415) 557-3415

Attorneys for
Petitioners